

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of)	
)	
KB PRIME MEDIA, LLC)	
(Assignor))	
)	
and)	File No. BALCT-20010806ABW
)	Facility ID No. 22245
WFXU CORPORATION)	
(Assignee))	
)	
For Consent to Assign the License of Station)	
WFXU(TV), Live Oak, Florida)	

Memorandum Opinion and Order

Adopted: March 29, 2002

Released: March 29, 2002

By the Commission: Commissioner Copps dissenting and issuing a statement.

I. Introduction

1. The Commission has before it for consideration the above-captioned application of KB Prime Media, LLC (“KB Prime”), for consent to assign the license of station WFXU(TV), Channel 57 (FOX), Live Oak, Florida, to WFXU Corporation (“WFXU Corp.”), a wholly owned subsidiary of Pegasus Communications Corporation (“PCC”). PCC also owns Pegasus Broadcast Television, Inc. (“Pegasus”), which is the licensee of WTLH(TV), Channel 41 (FOX), Bainbridge, Georgia.¹ WFXU Corp. currently programs station WFXU(TV) pursuant to a local marketing agreement (“LMA”). This application is unopposed.

2. Common ownership of stations WTLH(TV) and WFXU(TV) would violate the Commission's duopoly rule since both stations are located in the Tallahassee, Florida - Thomasville, Georgia Designated Market Area (“DMA”), which will not have eight operating independently owned commercial and noncommercial stations post-merger and the stations’ Grade B signal contours overlap.² Although station WFXU(TV) is a licensed station and has been operating since July 15, 1998, WFXU Corp. seeks to acquire it pursuant to an unbuilt station waiver of the television duopoly rule, as set forth in Note 7 of Section 73.3555 of the Commission's rules. 47 C.F.R. §73.3555, Note 7.

¹ On March 11, 2002, PCC amended its application to change the assignee from Pegasus to WFXU Corp., a new wholly owned subsidiary of PCC.

² Under the Commission's duopoly rule, an entity may own, operate or control two television stations licensed in the same DMA (as determined by Nielsen Media Research) if: (1) the Grade B contours of the stations do not overlap; or (2) if at least one of the stations is not ranked among the top four stations in the DMA in terms of audience share and eight or more independently owned commercial and noncommercial television stations will be licensed in the DMA post-merger. 47 C.F.R. § 73.3555(b) (1999).

II. Duopoly Waiver

3. The Commission in its *Local Ownership Order*³ established criteria for a waiver of the television duopoly rule for an “unbuilt station.” These criteria are:

- (a) The combination will result in the construction of an authorized, but as yet unbuilt station;
- (b) The permittee has made reasonable efforts to construct, but has been unable to do so; and
- (c) The in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station, and selling the station to an out-of-market buyer would result in an artificially depressed price.

Ordinarily, the applicant for a failing or unbuilt station duopoly waiver must set forth the efforts to sell the station to an out-of-market buyer. However, this showing is not required of a waiver applicant that seeks to acquire a station with which it entered into a LMA prior to the adoption of the *Local Ownership Order* in August 1999. See *Local Ownership Reconsideration Order*, 16 FCC Rcd at 1077. Because the LMA in this case was entered into on June 18, 1997, WFXU Corp. need only demonstrate compliance with the first two prongs of the unbuilt station waiver standard. Moreover, applicants such as WFXU Corp. may base waiver requests on circumstances as they existed at the time just prior to the parties entering into the LMA. 14 FCC Rcd at 12964. Thus, WFXU(TV)’s present operational status is not a bar to WFXU Corp. seeking an unbuilt station waiver.⁴

4. On March 5, 1987, Frank A. Baker (“Baker”) was granted a permit to construct station WFXU(TV). Subsequent to that date, Baker was granted extensions of time to build the station based on delays in zoning approval, delays in receipt of equipment, illness, the need to increase the coverage area of the station, problems with the site owner, and the need for approval to change transmitter locations. On April 9, 1996, Baker assigned the permit to L.O. Telecast, LLC (“L.O. Telecast”), a company owned 99 percent by Baker and one percent by Gerald Proctor (“Proctor”). At the time of the assignment, L.O. Telecast also entered into an oral agreement with Telecast of Florida, Inc. (“Telecast of Florida”), a company owned by Proctor and Richard Evans, whereby Telecast of Florida agreed to finance the construction of the station in exchange for the right to program time on the station once operational and an option to purchase the station. The parties ultimately finalized a formal written Time Brokerage Agreement (“TBA” or “LMA”) on June 18, 1997. On the same day, WFXU Corp. agreed to buy Telecast of Florida and assume the obligation to construct station WFXU(TV), as well as the rights and obligations under the LMA and option agreement. Following WFXU Corp.’s investment, station WFXU(TV) was successfully constructed and a license to cover was filed on July 15, 1998. WFXU Corp. subsequently assigned its option to buy station WFXU(TV) to KB Prime, and on February 16, 1999, KB Prime acquired the station from L.O. Telecast. KB Prime now seeks to assign the license to WFXU.

III. Discussion

³ See *Review of the Commission's Regulations Governing Television Broadcasting (“Local Ownership Order”)*, 14 FCC Rcd 12903, 12965 (1999), *recon. granted in part*, 16 FCC Rcd 1067 (2001) (“*Local Ownership Reconsideration Order*”), *appeal pending sub nom. Sinclair Broadcast Group, Inc. v. FCC*, No. 01-1079 (D.C. Cir. 2001).

⁴ See *Kentuckiana Broadcasting, Inc.*, 16 FCC Rcd 6974 (2001).

5. WFXU Corp. asserts that it has satisfied the test for receiving an unbuilt station waiver: (1) the combination of station WLTH(TV) and station WFXU(TV) resulted in the construction of an unbuilt station; and (2) the permittee made reasonable efforts to construct, but was unable to do so. In addition, WFXU Corp. asserts that the requested waiver will be in the public interest because it will enhance programming in the Tallahassee-Thomasville DMA by allowing the continued upgrade of WFXU(TV)'s programming and physical plant. With regard to the first prong of our unbuilt station waiver standard, *i.e.*, whether the combination of stations WLTH(TV) and WFXU(TV) resulted in the construction of an unbuilt station, we believe that the parties have met their burden. Station WFXU(TV) was unbuilt prior to WFXU Corp. buying Telecast of Florida and assuming the obligations of the LMA, despite substantial efforts to construct. Following WFXU Corp.'s investment, station WFXU(TV) was constructed and a license subsequently granted.

6. With respect to the second prong, WFXU Corp. claims that Baker, the original permittee of station WFXU(TV), made reasonable efforts to construct the station but was unable to do so on his own. WFXU Corp. submits a declaration from Baker who indicates that despite his best efforts, he was unable to complete construction of station WFXU(TV). Baker explains that he enlisted the help of Proctor, who Baker believed to have had prior experience in constructing and operating television stations. Baker states that he and Proctor entered into an agreement where Proctor's company agreed to finance construction of station WFXU(TV) in return for the right to program most or all of the time on the station, as well as an option to acquire the station once it was on the air. Baker declares that despite Proctor's best efforts, Proctor and his company were unable to construct the station. According to Baker, WFXU Corp.'s investment in the station was the impetus for it being constructed. WFXU Corp. also submits the declaration of Proctor. Proctor declares that Baker's lack of experience in operating a television station was a significant factor in his inability to construct the station. Proctor also declares that the station was not economically viable without a network affiliation agreement, which Baker was unable to obtain.

7. In addition to Proctor and Baker's declarations, WFXU Corp. cites the reasons given by Baker in his requests for extensions of time to build station WFXU(TV). In the initial extension request in 1990, Baker cited a delay in zoning approval as the reason the station could not be built. In 1991, "delays in receipt of equipment" were cited as justification for an extension request. In the fourth extension request in 1992, the permittee informed the Commission that the president of the construction company's illness prevented the station from being completed. Other reasons provided in extension requests included the need to increase the coverage area of the station, problems with the site owner, and the need for approval to change transmitter locations. The Commission found that the explanations given by Baker in support of his inability to construct station WFXU(TV) were reasonable, as evidenced by the fact that such extension requests were granted. The various attempts over the years to construct the station demonstrate that Baker (and subsequently L.O. Telecast) made reasonable efforts, but was unable, to construct the station without the assistance of WFXU. Therefore, we find that WFXU Corp. has satisfied the second prong of the unbuilt station waiver test.

8. We conclude that WFXU Corp. has satisfied both applicable prongs of the unbuilt station waiver standard and that waiver of the Commission's local television ownership rule to permit common ownership of stations WLTH(TV) and WFXU(TV) is justified. The LMA/purchase option arrangement allowed the permittee to complete construction of station WFXU(TV), which was the type of public interest benefit of LMAs cited by the Commission in the *Local Ownership Order* as warranting a waiver of the ownership rule.

IV. Conclusion

9. Having determined that the applicants are qualified in all respects, we find that grant of the application will serve the public interest, convenience, and necessity.

10. Accordingly, IT IS ORDERED, That the request for an unbuilt station waiver pursuant to Note 7 of the Commission's local television ownership rule, 47 C.F.R. §73.3555(b), to permit common ownership of WLTH(TV), Bainbridge, Georgia and WFXU(TV), Live Oak, Florida IS GRANTED.

11. IT IS FURTHER ORDERED, That the application of KB Prime Media, LLC and WFXU Corporation for consent to assign the license of WFXU(TV), Live Oak, Florida (File No. BALCT-20020806ABW) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL COPPS**

*In Re: Application of KB Prime Media, LLC (Assignor) and WFXU Corporation (Assignee)
For Consent to Assign the License of Station WFXU(TV), Live Oak, Florida*

I do not support a waiver of the local television ownership rule in Tallahassee, Florida. I do not believe that it is in the public interest to allow WFXU Corporation to own two of five commercial television stations in this market in violation of the local television ownership rule. The showing here does not adequately demonstrate that this station would not have been built absent Pegasus' intervention, as required by our rules. Accordingly, due to the harm to diversity and competition caused by the common ownership of two television stations in this market, I do not believe that the public interest is served by the grant of this waiver.